Supreme Court, U.S.
FILED
MAY 10 1999
CLERK

No. 98-1583

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES S. ANDERSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent argues that the court of appeals' decision—which allows him to claim the protection of the Fourth Amendment in a vacant and unused office at his employer's place of business, even though the office was not respondent's work space and he had no prior connection to it—is correct, factbound, and consistent with the decisions of other courts of appeals and this Court. None of those contentions is correct, and this Court's review is warranted.

1. The analysis of the decision below departs from a long line of court of appeals decisions, beginning with *United States* v. *Britt*, 508 F.2d 1052, 1056 (5th Cir.), cert. denied, 423 U.S. 825 (1975), holding that an employee may claim a reasonable expectation of privacy

only in those workplace areas with which he has a sufficient "business nexus," *i.e.*, generally speaking, the employee's own work areas. See Pet. 9-10 (citing, *inter alia*, *United States* v. *Chuang*, 897 F.2d 646, 649 (2d Cir.), cert. denied, 498 U.S. 824 (1990); and *United States* v. *Mohney*, 949 F.2d 1397, 1404 (6th Cir. 1991), cert. denied, 504 U.S. 910 (1992)). Respondent does not dispute the existence or validity of that line of authority. Nor does he disagree with Professor LaFave's observation that, "[i]n the absence of some other basis for showing [a reasonable expectation of privacy, such as a property interest in the area searched], it still seems necessary to establish that the place searched was rather directly connected with the defendant's employment responsibilities and activities." 5 Wayne R. LaFave, *Search and Seizure* § 11.3(d), at 164-165 (3d ed. 1996).

Respondent likewise cites no decision of any court permitting an employee to claim the protection of the Fourth Amendment in a part of his employer's place of business that is wholly divorced from the employee's own work area and work responsibilities. See Pet. App. 20a-21a (Kelly, J., dissenting) ("It is telling that the court cites no case involving a workplace where standing was found in the absence of such a nexus."). Instead, respondent asserts that the business nexus cases from the other courts of appeals are distinguishable, since none is "similar to the particularized factual locus framing the issues in this case." Br. in Opp. 7. But respondent nowhere describes those factual differences, or explains how they make a difference in the legal test to be applied. Nor does respondent explain how the business nexus cases from the other circuits can be reconciled with the result the court of appeals reached here—that an employee or officer can

claim the protection of the Fourth Amendment in an empty and otherwise unused office with which he had no prior connection (much less a business nexus) simply because he happened to be sitting there, attempting to view child pornography from his own videotapes, when an FBI agent entered. Pet. 12; Pet. App. 13a-14a.

2. For similar reasons, respondent's attempt to dismiss the court of appeals' decision as "fact-bound" (Br. in Opp. 10; see *id.* at 5) is without merit. Respondent is correct that a defendant's capacity to claim the protection of the Fourth Amendment in a particular area must be decided by reference to "all of the relevant circumstances," and that those circumstances may vary from case to case. Br. in Opp. 9. See also *id.* at 8, 9 n.24. But it is a function of the law to identify the circumstances that courts should consider relevant. Here, the factors the court of appeals relied upon were irrelevant.

For example, rather than focus on respondent's relationship to the location searched, the court of appeals relied primarily on respondent's relationship to the items in his possession (*i.e.*, the videotapes from which he was attempting to view child pornography). See Pet. 12-15; Pet. App. 10a-13a, 15a; Pet. App. 22a-23a (Kelly, J., dissenting). But, as we explained before (Pet. 13-15), the fact that respondent possessed and owned the videotapes does nothing to enhance the significance of his connection to the otherwise vacant and unused room in which he was found. Respondent, for his part, acknowledges that the court of appeals relied on his ownership and possession of the videotapes as a basis for permitting him to challenge the FBI's entry into the room. Br. in Opp. 9. But he offers no reason why his ownership or possession of the videotapes should be relevant.

Respondent also declines to defend the other factor cited by the court of appeals—respondent's efforts to maintain his privacy by blocking the windows and closing the door. See Pet. 16; Pet. App. 13a-14a. "[E]fforts to restrict access to an area," this Court has held, "do not generate a reasonable expectation of privacy where none would otherwise exist." Pet. 16 (quoting *New York* v. *Class*, 475 U.S. 106, 114 (1986)); see also Pet. App. 24a (Kelly, J., dissenting) ("The steps [respondent] took to ensure privacy [are] not enough [to establish a reasonable expectation of privacy], no matter how earnestly the steps were taken."); Pet. 16-17 (noting that, although the defendants in *Minnesota* v. *Carter*, 119 S. Ct. 469 (1998), made efforts to preserve their privacy by lowering the blinds, that conduct played no part in the Court's analysis of their capacity to claim the protection of the Fourth Amendment).

Respondent does claim that the court of appeals properly relied on the fact that he was present in the room when the FBI agent entered. Br. in Opp. 9. This Court, however, has long held that mere presence during the search—the fact that the defendant was "legitimately on premises"—is by itself insufficient. *Rakas* v. *Illinois*, 439 U.S. 128, 141-143 (1978). Respondent, moreover, concedes that his authority to enter and use that room was conditioned on "need," and limited to "purposes which [he] felt as an officer of the company were appropriate." Br. in Opp. 3, 12. Respondent, however, nowhere explains how the desire to view child pornography could be a permissible "need" for that vacant and unused office; nor does he explain how entry and use for that purpose could be "appropriate" within corporate policy.

3. Respondent's attempt to reconcile the court of appeals' analysis with this Court's decision in *Min-*

nesota v. *Carter*, 119 S. Ct. 469 (1998), see Br. in Opp. 11-12, similarly fails. Compare Pet. 17-19. Respondent does not dispute that, in *Carter*, this Court accorded no legal significance to *any* of the factors the court of appeals found dispositive here, even though each of them was present there as well. See Pet. 17.* Indeed, respondent concedes that, rather than examining the defendant's relationship to his possessions, his efforts to preserve privacy, or his mere presence, as the court of appeals did here, the Court in *Carter* instead "assess[ed] whether the defendants * * * could claim Fourth Amendment protections" by "focusing on the significance *of the connection between the defendants and the location searched.*" Br. in Opp. 7 n.17 (emphasis added).

Analysis of respondent's connection to the location searched in this case—the vacant and otherwise unused office in which respondent was attempting to view child pornography—shows that connection to be even more attenuated than the connection the Court held to be insufficient in *Carter*. Whereas the defendants in *Carter* had been in the apartment for hours at the time of the alleged search, 119 S. Ct. at 471, 473, respondent had been in the room (a room with which he had no prior connection) only a matter of minutes, Pet. App. 27a. Whereas the defendants in *Carter* had the leaseholder's permission to package narcotics there, 119

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* Just as respondent owned the videotapes at issue here, the defendants in *Carter* owned the drugs at issue there; just as respondent had the videotapes in his possession here, the defendants in *Carter* had the drugs in their possession there; just as respondent made efforts to prevent himself from being observed, so too did the defendants in *Carter*; and just as respondent was present during the search here, so too were the defendants in *Carter* present during the alleged search there. Pet. 17.

S. Ct. at 471-472, respondent's presence in the empty office had no authorized business purpose. And, unlike the apartment in which the *Carter* defendants were observed, the office in which respondent was discovered had a purely commercial function and in no sense functioned as a home. Surely if the *Carter* defendants' connection to the apartment where they had been packaging narcotics for two-and-one-half hours was too insubstantial to give rise to a reasonable expectation of privacy, then respondent's minutes-long connection to the empty and vacant office where he was attempting to view child pornography—a connection perilously close to mere presence—must be insufficient as well.

Declaring that "[t]he distinction between Respondent and the defendants in *Carter* is obvious," respondent argues that he had a sufficient connection to room 222 because it was "clearly within the confines of the corporate offices within which Respondent worked on a daily basis." Br. in Opp. 12. But even the court of appeals refused to conclude that respondent's privacy expectation in an empty and unused room was reasonable simply because it was within his employer's corporate building and he was an officer of the company. Pet. App. 8a. Nor is it possible to reconcile such an argument with the law of other circuits. See Pet. 9-10 (cases holding that employees must show not only that the location searched was within their place of employment, but also that they had a substantial business connection to it); pp. 1-2, *supra* (same).

4. Finally, respondent argues that this case does not warrant this Court's review because the evidence of respondent's guilt is more than sufficient even without the evidence that was suppressed. See Br. in Opp. 14 ("Petitioner will be able to present to the jury the numerous child pornography files and materials ob-

tained from Respondent's home in addition to Respondent's admission to his wife."). But the court of appeals' decision warrants plenary review, or a remand for further consideration in light of *Minnesota* v. *Carter*, *supra* (see Pet. 20), not merely because of its impact in this one case. Rather, it warrants review because it parts company with the mode of analysis employed by this Court and other courts of appeals; because it introduces unnecessary uncertainty into this area of law; and because it improperly expands Fourth Amendment protections in the workplace, potentially to any employee who enters a room at his employer's place of business, possessions in hand, and closes the door behind him. See Pet. App. 22a (Kelly, J., dissenting).

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For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

MAY 1999